STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA EMILY PERSECHINI, as Personal Representative of the Estate of MICHAEL PERSECHINI, Deceased,

Plaintiff-Appellant,

v

WILSON AUTOMATION COMPANY, THE CROSS COMPANY, and GIDDINGS & LEWIS,

Defendants-Appellees.

UNPUBLISHED
October 22, 1999

No. 208462
Wayne Circuit Court
LC No. 96-619875 NP

Before: Gribbs, P.J., and O'Connell and R. B. Burns*, JJ.

PER CURIAM.

This is a wrongful death action arising from a tragic accident which took place on an assembly line known as "the Cross line." Plaintiff appeals from an order granting summary disposition to defendants under MCR 2.116 (C)(7). We affirm.

Plaintiff argues that, for several reasons, the trial court erred in granting summary disposition to defendants on the basis of the statute of repose, MCL 600.5839(1); MSA 27A.5839(1). We disagree. This court reviews a trial court's decision on a motion for summary disposition de novo. *Travelers Ins Co v Guardian Alarm Co*, 231 Mich App 473, 477; 586 NW2d 760 (1998). Summary disposition is proper under MCR 2.116(C)(7) where a claim is time-barred. *Travelers, supra*, 231 Mich App at 477. When deciding a motion for summary disposition under MCR 2.116(C)(7), the trial court must take all well-pleaded allegations as true, and construe all affidavits, admissions, and other documentary evidence in favor of the nonmoving party. *Travelers, supra*, 231 Mich App at 477. If there are no facts in dispute, whether a claim is barred is a question of law for the court. *Travelers, supra*, 231 Mich App at 477.

Plaintiff first argues that the trial court erred in granting summary disposition because the trial court relied on an unpublished Court of Appeals opinion in support of their argument. We disagree.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

While unpublished opinions are obviously not binding, a court is free to find their reasoning persuasive. See *Steele v Dep't of Corrections*, 215 Mich App 710, 714 n 2; 546 NW2d 725 (1996); see also MCR 7.215(C)(1). Further, any error in this regard was harmless because the unpublished decision was consistent with the published cases discussed below.

Second, plaintiff argues that summary disposition was premature because discovery was still open. We again disagree. After carefully reviewing the record, we conclude that summary disposition was proper in this case because further discovery did not stand a fair chance of uncovering factual support for plaintiff's position. See *Bayn v Dep't of Natural Resources*, 202 Mich App 66, 70; 507 NW2d 746 (1993).

Third, plaintiff argues that defendant Wilson waived the statute of repose as an affirmative defense by failing to specifically plead it in its answer. We disagree. Our Supreme Court has held that MCL 600.5839; MSA 27A.5839, is both a statute of limitations and a statute of repose because it provides a time limit during which to sue, and also prevents later actions from accruing at all. See *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980). Where a statute acts in this dual fashion, pleading the statute of limitations -- as defendant Wilson did here -- is sufficient to preserve both defenses. *Sills v Oakland General Hospital*, 220 Mich App 303, 308; 559 NW2d 348 (1996).

On the merits, plaintiff argues that the Cross line was not "an improvement to real property" because it was designed, manufactured and assembled away from the plant, and then transported and affixed to it. Therefore, plaintiff argues, defendants Cross and Giddings were mere manufacturers of a product, and were not protected by the statute of repose. We disagree.

The statute provides that "no" personal injury action "arising out of the defective and unsafe condition of an improvement to real property" "shall be maintained *more than 10 years* after the time of occupancy of the completed improvement, use, or acceptance of the improvement." MCL 600.5839; MSA 27A.5839 (emphasis added). Here, it is undisputed that the Cross line was installed about twenty-five years before the accident. Therefore, if the line was "an improvement to real property," plaintiff's claim against defendants Cross and Giddings is time-barred.

An improvement has been defined as a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Pendzu v Beaver East, Inc*, 219 Mich App 405, 410; 557 NW2d 127 (1996) (quoting *Adair v Koppers Co, Inc*, 741 F2d 111, 112 (CA 6, 1984)). "The test for an improvement is *not* whether the modification can be removed without damage to the land, *but whether it adds to the value of the realty for the purposes for which it was intended to be used*;" in addition, the nature and permanence of the improvement should be considered. *Travelers, supra*, 231 Mich App at 478 (emphasis added).

In this case, plaintiff does not dispute that the Cross line was a permanent addition to the facility, nor that it enhanced the facility's capital value, and made the property more useful and valuable for manufacturing axles. Further, the line was about a hundred feet long, about nine feet high in places, and

weighed about 150 tons. However, contrary to plaintiff's argument, the statute does not take into account whether the product was built elsewhere, transported to the site, and then affixed to the realty. See *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 517-518 and n 8; 573 NW2d 611 (1998) (manufactured homes largely built off-site were an improvement to real property); see also *Fennell v John J Nesbitt, Inc*, 154 Mich App 644, 650-651; 398 NW2d 481 (1986) (school heating and cooling system was an improvement to real property). Therefore, the trial court properly found that the line was an improvement to real property.

Similarly, plaintiff argues that the non-interlocking guarding supplied by defendant Wilson were mass-produced and non-essential -- because the loaders were able to function without the protective guard in place -- and that defendant Wilson was therefore not protected by the statute of repose. We again disagree.

Defendant Wilson designed loaders that pick up parts from platforms on the assembly line and transfer them to other stations in the same line for further processing. It is undisputed that the loaders designed by defendant Wilson were essential to the movement of parts from one station to another on the Cross line. The non-interlocked guarding which apparently caused the accident was only a piece of the loader assembly supplied by defendant Wilson. However, "[t]he statute does not make a distinction on the basis of whether a defendant offers a mass-produced product." *Frankenmuth, supra*, 456 Mich at 518 n 8. "Furthermore, if a component of an improvement is an integral part of the improvement to which it belongs, then the component [also] constitutes an improvement to real property." *Travelers, supra*, 231 Mich App at 478. Therefore, the trial court did not err in declining to focus only on the guarding, and in finding instead that the loaders as a whole were integrated into the Cross line and therefore were also an improvement to real estate.

Affirmed.

/s/ Roman S. Gribbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns